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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ____

STANLEY NICKOLICH,

Appellant,

vs.

STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Supreme Court of Ohio and the courts below have not yet been reported.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Ohio was entered on October 2, 1968. There was no motion for rehearing.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (2) and this Court's Rule 10 inasmuch as the Ohio Courts have denied petitioner rights and privileges guaranteed under the Constitution of the United States in ruling and sustaining a ruling under authority of a recently enacted statute which is in opposition to statutes specifically dealing with the rights on arrest and to a preliminary hearing, making eminently possible an unequal treatment of an accused person and denial of rights otherwise established.

The offending statute is Section 2945.50 of the Ohio Revised Code. We referred to the 1967 Supplement of Page's Revised Code Annotated. This section reads as follows:

§ 2945.50 Deposition in criminal cases.

♦ At any time after an issue of fact is joined upon an indictment ♦, information, or an affidavit, the prosecution or the defendant may apply in writing to the court ♦ in which such indictment, information, or affidavit is pending for a commission to take the depositions of ♦ any witness. The court or a judge thereof may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the ♦ prosecution or to the defendant, before such witness shall be examined.♦

QUESTIONS PRESENTED

1. Can there be uniformity in the law, equal protection of the law or due process of law when a defendant or defendants on indictment without preliminary hearing are denied a request to depose witnesses under a statute leaving the granting of such request to the discretion of the trial court, without guidelines, when older and more pertinently applicable sections of the code in specific terms give a right to preliminary hearing and at such preliminary hearing a right to cross-examine witnesses and examine documents?

2. Can there be effective representation where authority to examine witnesses prior to trial is denied?

3. Can there be equal protection of the laws, uniformity of the law, and due process of law when a court can and does deny a commission to take depositions for the stated capricious reason that the court finds that no legitimate reason has been advanced by the defendant to warrant the grant of such commission, or a court requires counsel to state what he wants to learn before the grant of such com-

mission, when in fact what he wants to learn is necessarily what, if anything, there is to learn so that he can properly advise his client?

STATEMENT OF THE CASE

Section 2935.14 found in Chapter 2935 of the Ohio Revised Code which chapter specifically deals with criminal procedure on detection and arrest gives to an accused a right to counsel. Such section reads in part as follows: (The full text can be found on page 13a of the Appendix herein).

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Section 2937.02, found in Chapter 2937 of the Revised Code of Ohio, which chapter deals specifically with criminal procedures for preliminary examinations and bail specifically gives a right to a prelimiary hearing. A portion of paragraph (D) of such section reads as follows: (The full text of said section is set forth on page 14a of the Appendix).

(D) If the charge be a felony, inform the accused of the nature and extent of possible punishment on conviction and of the right to preliminary hearing.

Section 2937.11 sets forth the nature of such preliminary hearing. This section reads as follows:

§ 2937.11 Presentation of state's case.

At the preliminary hearing, pursuant to section 2937.10 of the Revised Code, the prosecutor may, but shall not be required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state, under the rules of evidence prevailing in criminal trials generally, the accused and the magistrate having full right of cross examination and the accused the right of inspection of exhibits prior to their introduction. On motion of either the state or the accused, witnesses shall be separated and not permitted in the hearing room except when called to testify.

The defendant was arrested, taken before the Court, had his rights explained to him including his right to a preliminary hearing, and a date for a preliminary hearing was set.

However, prior to the date set for preliminary hearing, defendant's matter was taken before the Grand Jury and the defendant was indicted. On learning of the indictment, counsel for defendant made application for a commission to depose witnesses under Section 2945.50 of the Revised Code of Ohio. The application was denied.

The reasoning of the court follows and we quote from a part of the entry. (The entry appears in full on page 10a of the Appendix).

> "* * * The Court, on consideration of the same, finds that no legitimate reason has been advanced by the defendant, Stanley Nickolick, that would warrant the Court to grant a commission to take the deposition of Leroy Alvis, Jr., and Tomas Smith, and that said application and motion should be, and the same hereby is denied. Exceptions saved to the defendant, Stanley Nickolick."

Defendant was tried and convicted of breaking and entering and of grand larceny and was sentenced to consecutive terms in the Ohio Penitentiary. The questions presented were raised by assignment of error on appeal to the Court of Appeals for the Fifth District of Ohio in this and the companion case of State of Ohio v. John Thomas Gianikos. The Court of Appeals affirmed the conviction and dismissed the appeal, citing as its authority the opinion of the Ohio Supreme Court in the case of *State v. Jackman,* 9 O. S. 2d, 159, portions of which read as follows:

> "We do not believe that the phrase, 'may grant,' which appears in both Section 2945.50 and Section 2319.14 of the Revised Code indicates that the trial court has been delegated an *'absolute, uncontrolled discretion'* to determine in what cases discovery depositions may be taken, as the Court of Appeals said. (Emphasis added.) Rather, that phrase means that the trial court must consider the merits of an application for a commission in accordance with certain rules that the law has already fashioned in the discovery area.
>
> Section 2945.50 is not the law's first attempt at discovery depositions. Although it is relatively new, it rests on a sound foundation of case law and statutes. Guidelines have already been established. The void that the Court of Appeals postulated does not exist.
>
> * * * *
>
> The civil guidelines are available to the presiding judge in the trial of criminal causes. Section 2945.41 of the Revised Code. He is clothed with the same discretion as is the judge in a civil cause.

And the Court goes on to state:

One of the sections thus referred to is Section 2319.05 R.C. which reads in pertinent part as follows:

> "Use of deposition.
>
> The deposition of a witness may be used only:
>
> (A) When it is made to appear to the satisfaction of the court that he does not reside in, or is absent

from, the county where the action or proceeding is pending * * *."

This statute provides a guideline to aid the court in deciding on the application to have the commission appointed to take these depositions.

The Supreme Court of Ohio overruled defendant-appellant's motion for leave to appeal, stating

It is apparent from the transcript and record that these depositions if taken could never have been used in court. Their taking would have been a vain and useless thing. Their taking could have meant unnecessary public expense.

Applying the guideline in Section 2319.05 R.C., supra, and other case law and statutes, it is apparent that the trial court did not abuse his discretion in refusing to grant the motion for the commission to take these depositions.

GROUNDS FOR PLENARY CONSIDERATION

The United States Constitution guarantees and our social order demands uniformity in the law and equal protection under the law.

In Ohio all crimes and criminal procedures are statutory.

As noted, the statutes of Ohio specifically dealing with matters of arrest and preliminary hearings clearly give a right to representation by counsel and a preliminary hearing in the course of which defendant has a right to cross-examine witnesses for the state.

In the vast majority of cases, the outlined procedure is strictly adhered to, the defendant moving from arraignment to preliminary hearing, unless waived, and on the finding of the Court of sufficient cause, defendant is bound over to the Grand Jury for indictment or release. However, with sufficient frequency to make it a matter of general concern, accused persons, as was this defendant, are taken directly to the Grand Jury without preliminary hearing.

The offending statute, Section 2945.50 of the Ohio Revised Code, in leaving the matter of granting a commission to depose witnesses to the discretion of the trial court without guidelines makes eminently possible a deprivation of the clearly given right to a preliminary hearing and examination of state witnesses resulting, and as in this case, in a deprivation of equal protection of the laws and makes for a lack of uniformity in the law.

The defendant was convicted of burglary and grand larceny, both being a part of one incident as is generally the case.

The accused, of course, has always a choice of making a plea or going to trial and the very clear right to the advice of counsel in making the determination of which it shall be. It is not possible for counsel to properly advise a defendant without knowledge of the force of the state's case. It is not simply a matter of guilt or innocence but also necessarily and clearly a matter of punishment, and our courts have the authority to nolle prosequi charges, and it happens with considerable frequency that when an accused has more than one charge against him, one or more charges are dismissed on a plea of guilty to one or others and this is particularly true where more than one charge arose out of the same incident.

Knowledge of the state's case, of course, is necessary to combat possible circumstantial evidence.

The defendant in this case, and others in similar situations are being deprived of a very substantial right generally given to other litigants in the State of Ohio. This has eminent potential, as evidenced by this case, to deprive an accused of due process and the equal protection of the laws, to deprive an accused of his right to the effective representation by counsel, and to cause a lack of uniformity in the law.

The position of the Ohio courts that guidelines are established in sections of the code treating with procedures in civil proceedings is simply not tenable.

Respectfully submitted,

GEORGE E. TYACK & PAUL SCOTT,
Attorneys for Stanley Nickolich,
Appellant.

APPENDIX 1

THE SUPREME COURT OF THE STATE OF OHIO

1968 TERM

To wit: October 2, 1968

No. 68-264

THE STATE OF OHIO,
City of Columbus
The State of Ohio,
Plaintiff-Appellee,

vs.

Stanley Nickolick,
Defendant-Appellant.

MANDATE

To the Honorable COMMON PLEAS COURT
Within and for the County of FAIRFIELD, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING
THOMAS L. STARTZMAN,
Clerk

..... *19*....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee .....$20.00 *Paid by* Paul Scott

APPENDIX 2

THE SUPREME COURT OF THE STATE OF OHIO

1968 TERM

To wit: October 2, 1968

No. 68-264

THE STATE OF OHIO,
City of Columbus
The State of Ohio,
Plaintiff-Appellee,

vs.

Stanley Nickolick,
Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for FAIRFIELD *County*

It is ordered by the Court that this motion is overruled.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

COSTS:

Motion Fee, $20.00; paid by Paul Scott

.....

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ... day of ..... 19...

..... *Clerk*

..... *Deputy*

APPENDIX 3

THE SUPREME COURT OF THE STATE OF OHIO

1968 TERM

To wit: October 2, 1968

No. 68-264

THE STATE OF OHIO,
City of Columbus
The State of Ohio,

Plaintiff-Appellee,

vs.

Stanley Nickolick,

Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
for FAIRFIELD *County*

This cause, here on appeal as of right from the Court of Appeals for FAIRFIELD *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

It is further ordered that the appellee recover from the appellant its *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* FAIRFIELD *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this .... day of ..... 19...

..... *Clerk*

..... *Deputy*

APPENDIX 4

COURT OF APPEALS, FIFTH DISTRICT
FAIRFIELD COUNTY, OHIO

THE STATE OF OHIO,

Plaintiff-Appellee,

vs.

JOHN THOMAS GIANIKOS AND
STANLEY NICKOLICK,

Defendants-Appellants.

Case No. 430

MEMO

Judges:

Hon. D. Deane McLaughlin, PJ
Hon. Paul D. Van Nostran
Hon. Leland Rutherford

Decided March .., 1968.

Appearances:

E. Raymond Morehart, Prosecuting Attorney, counsel for Plaintiff-Appellee.

Paul Scott, attorney for Defendant-Appellant.

By the Court:

This law appeal is from a joint conviction and sentence of these two defendants for Burglary and Grand Larceny. They filed a joint Notice of Appeal, and in separate briefs assigned, in effect, the same one Assignment of Error:

> That the trial court erred in overruling defendant's mo- for application to take the depositions of Leroy Alvis, Jr. and Thomas Smith pursuant to Section 2945.50, Revised Code of the State of Ohio; and that said error was prejudicial to the rights of the defendant.

Section 2945.50 R.C., provides in pertinent part:

> "At any time after an issue of fact is joined upon an indictment, information or an affidavit, the prosecution or the defendant may apply in writing to the court in which such indictment, information, or affidavit is pending for a commission to take the depositions of any witness. The court or a judge thereof may grant such commission * * *."

We note that the statute uses the words "may grant". This is a clear indication that the court is clothed with discretion in granting or refusing such commission.

Both parties here place reliance upon the recent case of State vs. Jackman, 9 O.S. 2d, 159. That case held Sec. 2945.50 R.C., supra, to be constitutional. The opinion of Judge Herbert attentioned the words "may grant" using the following language:

> "We do not believe that the phrase, 'may grant,' which appears in both Section 2945.50 and Section 2319.14 of the revised Code indicates that the trial court has been delegated an '*absolute, uncontrolled discretion*' to determine in what cases discovery depositions may be taken, as the Court of Appeals said. (Emphasis added.) Rather, that phrase means that the trial court must consider the merits of an application for a commission in accordance with certain rules that the law has already fashioned in the discovery area.
>
> "'Section 2945.50 is not the law's first attempt at discovery depositions. Although it is relatively new, it rests on a sound foundation of case law and statutes. Guidelines have already been established. The void that the Court of Appeals postulated does not exist.
>
> "* * *
>
> "The civil guidelines are available to the presiding judge in the trial of criminal causes. Section 2945.41 of the Revised Code. He is clothed with the same discretion as is the judge in a civil cause.
>
> "Moreover, the statutes themselves provide further guidelines to aid the court in deciding on an application.
>
> "* * *

"Moreover, in the light of Sections 2945.51, 2945.52, 2945.53 and 2945.54 of the Revised Code—all of which concern the possible payment of expenses out of the treasury—a trial court has the duty to determine whether, under the circumstances, the taking of depositions would serve the administration of justice."

One of the sections thus referred to is Section 2319.05 R.C., which reads in pertinent part as follows:

"Use of deposition.
"The deposition of a witness may be used only:
"(A) When it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending * * *."

This statute provides a guideline to aid the court in deciding on the application to have the commission appointed to take these depositions.

The transcript and record show that the court did consider the merits of the application for a commission. The record shows also that at the trial both Leroy Alvis, Jr. and Thomas Smith were called as witnesses. The transcript shows that motion for the commission was filed just six days before the trial date and after the trial date had been set and counsel notified thereof. Opportunity was given to counsel to argue the motion for the commission but failed to appear at the hearing. Further opportunity was afforded defense counsel to be heard in the absence of jury at the time of trial, as shown by the record, and defendants' counsel made no request therefor.

It is apparent from the transcript and record that these depositions if taken could never have been used in court. Their taking would have been a vain and useless thing. Their taking could have meant unnecessary public expense.

Applying the guideline in Section 2319.05 R.C., supra, and other case law and statutes, it is apparent that the

trial court did not abuse his discretion in refusing to grant the motion for the commission to take these depositions.

The Assignment of Error is overruled and the judgment of the trial court, as well as the conviction and sentence of both defendants, is affirmed.

Judgment affirmed.
Entry accordingly.

D. Deane McLaughlin
Paul D. Van Nostran
Leland Rutherford

JUDGES.

APPENDIX 5
IN THE COURT OF APPEALS, FIFTH DISTRICT
FAIRFIELD COUNTY, OHIO

Case No. 430

THE STATE OF OHIO,

Plaintiff-Appellee,

vs.

JOHN THOMAS GIANIKOS AND
STANLEY NICKOLICK,

Defendants-Appellants.

ENTRY

As to Stanley Nickolick

This cause came on for hearing on the appeal of the defendants-appellants on questions of law from the joint conviction and sentence of the defendants-appellants for the crimes of burglarly and grand larceny.

The Court, on consideration of the briefs and the arguments of counsel, finds that the assignment of error is not well taken and that the same should be overruled.

It is therefore ordered, and the judgment of this Court, that the conviction and sentence of the trial court of this defendant is affirmed. The defendants-appellants to pay the costs.

.....

.....

.....

Judges.

Approved:

.....

Prosecuting Attorney

.....

Attorney for Defendant-Appellant,
Stanley Nickolick

APPENDIX 6
IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, OHIO
Case No. 6795

THE STATE OF OHIO,

vs.

JOHN THOMAS GIANIKOS AND
STANLEY NICKOLICK,

Defendants.

ENTRY AS TO STANLEY NICKOLICK

[Filed April 26, 1967]

This cause came on for hearing on the application of the defendant, Stanley Nickolick to take the deposition of Leroy Alvis Jr., and Tomas Smith, and memorandum in support of said motion.

The Court, on consideration of the same, finds that no legitimate reason has been advanced by the defendant, Stanley Nickolick, that would warrant the Court to grant a commission to take the deposition of Leroy Alvis Jr., and Tomas Smith, and that said application and motion should be, and the same hereby is denied. Exceptions saved to the defendant, Stanley Nickolick.

.....

Judge.

Approved:

.....

Prosecuting Attorney

.....

Counsel for Defendant,
Stanley Nickolick.

APPENDIX 7

IN THE COURT OF COMMON PLEAS
FAIRFIELD COUNTY
STATE OF OHIO
Number 6795

STATE OF OHIO,

Plaintiff,

vs.

JOHN THOMAS GIANIKOS, ET AL.,

Defendants.

MEMORANDUM
RE: Ruling on Motion
[Filed April 7, 1967]

1. No legitimate reasons having been advanced by the defendant that would warrant the Court granting a Commission to take the depositions of Leroy Alvis, Jr. and Tom Smith, the Application to take such depositions of said persons is hereby denied.
2. The request that the prosecuting attorney be required to furnish the defendant with a Bill of Particulars is hereby denied.

To Attorney for the State:

Please prepare an entry in accordance with the above ruling, present it to opposing counsel for approval, and submit it to the Court for signature in accordance with the Rules of Court. Then file it immediately with the Clerk of Courts.

.....

Judge.

Notice:
E. Raymond Morehart
George Wm. Lias
4-7-67
590

APPENDIX 8

§2945.50 Deposition in criminal cases.

♦ At any time after an issue of fact is joined upon an indictment ♦, information, or an affidavit, the prosecution or the defendant may apply in writing to the court ♦ in which such indictment, information, or affidavit is pending for a commission to take the depositions of ♦ any witness. The court or a judge thereof may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the ♦ prosecution or to the defendant, before such witness shall be examined. ♦

APPENDIX 9

§ 2935.14 Rights of persons arrested.

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choce, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than thirty days, or both.

APPENDIX 10

§ 2937.02 Announcement of charge and rights of accused by court.

When, after arrest, the accused is taken before a court or magistrate, or when the accused appears pursuant to terms of summons or notice, the affidavit or complaint being first filed, the court or magistrate shall, before proceeding further

(A) Inform the accused of the nature of the charge against him and the identity of the complainant and permit the accused of his counsel to see and read the affidavit or complaint or a copy thereof;

(B) Inform the accused of his right to have counsel and the right to a continuance in the proceedings to secure counsel;

(C) Inform the accused of the effect of pleas of guilty, not guilty, and no contest, of his right to trial by jury, and the necessity of making written demand therefor;

(D) If the charge be a felony, inform the accused of the nature and extent of possible punishment on conviction and of the right to preliminary hearing. Such information may be given to each accused individually or, if at any time there exists any substantial number of defendants to be arraigned at the same session, the judge or magistrate may, by general announcement or by distribution of printed matter, advise all those accused concerning those rights general in their nature, and informing as to individual matters at arraignment.

APPENDIX 11

§2937.11 Presentation of state's case.

At the preliminary hearing, pursuant to section 2937.10 of the Revised Code, the prosecutor may, but shall not be required to, state orally the case for the state, and shall then proceed to examine witnesses and intorduce exhibits for the state, under the rules of evidence prevailing in criminal trials generally, the accused and the magistrate having full right of cross examination and the accused the right of inspection of exhibits prior to their introduction. On motion of either the state or the accused, witnesses shall be separated and not permitted in the hearing room except when called to testify.

CERTIFICATE OF SERVICE

I, George E. Tyack, one of the attorneys for Stanley Nickolich, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of ....., 1969, I served copies of the foregoing Jurisdictional Statement on the several parties thereto as follows: E. Raymond Morehart, Prosecuting Attorney of Fairfield County, Ohio, by certified mail, postage prepaid, return receipt requested.

GEORGE E. TYACK
Counsel for Appellant.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1052

STANLEY NICKOLICK,

Appellant,

vs.

STATE OF OHIO,

Appellee.

MOTION TO DISMISS AND MOTION TO AFFIRM

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio
Equitable Building
Lancaster, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1052

STANLEY NICKOLICK,

Appellant,

vs.

STATE OF OHIO,

Appellee.

MOTION TO DISMISS AND MOTION TO AFFIRM

MOTION TO DISMISS

The appellee, State of Ohio, moves the Court to dismiss the within styled cause of action for the reason that the appellant has failed to comply with the time requirements of Supreme Court Rule 13 (1).

The judgment of the Supreme Court of Ohio in this case was entered on October 2, 1968. There was no motion for Rehearing. The Notice of Appeal was filed by the appellant in the Supreme Court of the United States on December 27, 1968. The case was docketed by the appellant on February 17, 1969, 46 days after the expiration of the 90 days provided by the rule. That during such extended period the appellant made no application for an extension or an enlargement of time nor did any explanation accompany the untimely docketing of the appeal.

This Court in *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company,* 385 US 32, in its head note uses the following language:

> "An appeal will be dismissed by the Supreme Court of the United States for the appellant's failure to comply with the time requirements of Supreme Court Rule

13(1), where the case was not docketed nor the record filed until 22 days after the expiration of the 60-day period provided by the Rule, and during that period the appellant made no application for an enlargement of time nor did any explanation accompany the untimely docketing of the appeal, and it was only in its reply to the appellee's motion to dismiss that the appellant stated that the delay was occasioned by a misunderstanding between counsel for the appellant."

MOTION TO AFFIRM

The State of Ohio, appellee, moves the Court to affirm the judgment sought to be reviewed on appeal from the Supreme Court of Ohio on the ground that the decision is well based on substantial Ohio law and no Federal question is raised.

Section 2945.50 of the Ohio Revised Code which is sought to be reviewed in this matter was enacted in 1965 and the Supreme Court of Ohio has dealt with interpretations of that statute on two occasions since that time.

In *State ex rel Jackman, 9 OS 2d 159,* which is also referred to by the appellant in his brief, the Supreme Court of Ohio held that the provisions of Section 2945.50 of the Ohio Revised Code were constitutional. The Court then went on to talk about the discretion of the Court in the matter of "may grant". At page 167, the Court used the following language:

> "Rather that phrase means that the trial court must consider the merits of an application for a commission in accordance with certain rules that the law has already fashioned in the discovery area."
>
> • • •
>
> "The civil guidelines are available to the presiding judge in the trial of criminal cases, Section 2545.41 of the Revised Code. He is clothed with the same discretion as is the judge in a civil case."
>
> • • •
>
> "Moreover, in the light of Sections 2945.51, 2945.52, 2945.53 and 2945.54 of the Revised Code—all of which concern the possible payment of expenses out of the

treasury—*a trial court has the duty to determine whether, under the circumstances, the taking of depositions would serve the administration of justice.*" (Emphasis added)

In *State v. Hill 12 Ohio State 2d 88,* the Supreme Court of Ohio held in their syllabus that:

> "The allowance or overruling under Section 2945.50, Revised Code, of a motion to appoint a commissioner to take pretrial depositions in a criminal case rests within the sound discretion of the court, and, unless a plain abuse of that discretion is shown, no prejudicial error occurs".

In the body of the opinion itself Judge Zimmerman uses the following language:

> "First, the claim is made that the trial court committed reversible error in overruling defendant's motion to appoint a commissioner to take pretrial depositions under the provisions of Section 2945.50, Revised Code. Such motion was overruled for the stated reason "that said witnesses will be available to testify at time of trial one week from date."
>
> It will be noted that this statute provides, inter alia, that, "The court or a judge thereof may grant such commission." The overruling of the motion violated no due process provision of the state or federal constitutions and is largely a matter within judicial discretion. It seems apparent that counsel for defendant were aware generally of the testimony to be expected of the witnesses at the imminent trial, and that opportunity would then be given to thoroughly examine them. Reading between the lines, the thought suggests itself that the court may have concluded that the motion's objective was to conduct what is commonly termed a "fishing expedition." Moreover, there is no indication that the result of the trial would have been different had the depositions been taken."

The trial court made the following ruling on the motions referred to by the appellant:

> "The Court, on consideration of the same, finds that no legitimate reason has been advanced by the defendant, Stanley Nickolick, that would warrant the Court to grant permission to take the deposition of Leroy Alvis, Jr., and Thomas Smith, and that said applica-

tion and motion should be, and the same hereby is denied***."

The Fifth District Court of Appeals for Fairfield County, Ohio, in their opinion used the following language in affirming the action of the lower court:

> "The transcript and record show that the court did consider the merits of the application for a commission. The record shows also that at the trial both Leroy Alvis, Jr. and Thomas Smith were called as witnesses. The transcript shows that motion for the commission was filed just six days before the trial date and after the trial date had been set and counsel notified thereof. Opportunity was given to counsel to argue the motion for the commission but failed to appear at the hearing. Further opportunity was afforded defense counsel, to be heard in the absence of jury at the time of trial, as shown by the record, and defendant's counsel made no request therefor.
>
> "It is apparent from the transcript and record that these depositions if taken could never have been used in court. Their taking would have been a vain and useless thing. Their taking could have meant unnecessary public expense."

It does not appear from the rulings of the Supreme Court of Ohio in *State ex rel Jackman* case and in the *State vs. Hill* cases that there is any conflict between these decisions. The *Jackman* case established guide lines for the trial courts to follow and the *Hill* case basically said that there is no error if the trial court follows the guidelines unless there is a plain abuse of this discretion.

The appellant in the instant matter is asking this Court to consider an issue well settled in Ohio law which has been ruled on twice by the Supreme Court of Ohio and neither of said decisions are in conflict with the other.

Respectfully submitted,

.....

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio

CERTIFICATE OF SERVICE

I, E. Raymond Morehart, Attorney for Appellee, State of Ohio, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1969, I served a copy of the foregoing Motion to Dismiss and Motion to Affirm on George E. Tyack and Paul Scott, by mailing same to said counsel for Appellant by certified mail, postage pre-paid, return receipt requested.

.....

E. RAYMOND MOREHART
Prosecuting Attorney
Fairfield County, Ohio
Attorney for Appellee

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

NICKOLICH *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1052. Decided April 1, 1969.

PER CURIAM:

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.